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In the

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-103

GREAT LAKES DREDGE & DOCK COMPANY, INC.,
Petitioner,

v.

DEBORAH FURKA,
Administratrix of the Estate of PAUL FURKA, deceased,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Of Counsel
September 6, 1985

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App

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Since the Petition for Writ of Certiorari was filed on July 3, 1985, counsel for the petitioner have learned of the Ninth Circuit's decision in *Berg v. Chevron U.S.A., Inc.*, 759 F.2d 1425 (9th Cir. 1985). *Berg,* decided on May 9, 1985, cites the opinion below, *Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085 (4th Cir. 1985), for the proposition that fault may not be assigned to a maritime rescuer unless the rescuer's behavior is wanton or reckless. 759 F.2d at 1429. It also adopts portions of the Fifth Circuit's opinion in *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1021-22

(5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033 (1970). The Ninth Circuit's reliance in *Berg* upon *Furka* and *Grigsby* reinforces the reasons previously outlined by petitioner why the writ of certiorari should issue in this case.

As discussed in the Petition for a Writ of Certiorari, p. 10, *Grigsby* was a "status" case, in which the primary issue was whether or not the plaintiff's decedent was a "*Sieracki* seaman," to whom a warranty of seaworthiness would be owed. It did not discuss the rescue doctrine. Petitioner predicted that the misapplication of *Grigsby* by the Fourth Circuit in *Furka* would cause future problems and conflicts. *Id.* Sooner than had been anticipated, *Berg* proved this to be so.

In *Berg,* the claimant was not the would-be rescuer, as in *Furka,* but was rather the victim and intended rescuee. The trial judge found that negligence of the rescuer had caused Berg's death. On appeal, the Ninth Circuit held that the rescuer could "be held liable [to the rescuee] only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue." 759 F.2d at 1430.

Unlike *Berg,* neither *Grigsby* nor *Furka* considered the liability of a rescuer to another person. Evaluation of the standard of care owed by a rescuer to the person in peril, as in *Berg,* may require the assessment of considerations different from those surrounding the degree of care which a rescuer must use for the rescuer's own protection, as in *Grigsby* and *Furka*. The mixing and cross-citation of these concepts reinforces petitioner's assertion that the standards of care in maritime rescues should be addressed by this Court.

Berg also broadens the conflict between the circuits. In aligning itself with the Fourth Circuit, the Ninth Cir-

cuit failed to mention either *Hlodan v. Ohio Barge Line, Inc.*, 611 F.2d 71 (5th Cir. 1980), or *Asaro v. Parisi*, 297 F.2d 859 (1st Cir.), *cert. denied*, 370 U.S. 904 (1962), in both of which the standard applied was reasonable care under the circumstances of the emergency. Thus, four circuits have now addressed this issue and have split evenly, two to two, on the result.

For these reasons, and for the reasons previously stated in the Petition for a Writ of Certiorari, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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September 6, 1985

[1] In accordance with Rule 28.1 of this Court, petitioner states that its corporate affiliations are unchanged from those set out in footnote one of the Petition for a Writ of Certiorari.